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No. 84-1136

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEO BURROUGHS, JR., ET AL., PETITIONERS

v.

CARLA HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners challenge the court of appeals' conclusion that the National Housing Act (the Act), 12 U.S.C. 1701 *et seq.*, does not create a private right of action on behalf of neighborhood residents for damages flowing from the deterioration of a federally-owned building. They also challenge the court of appeals' holding that the prevailing parties should have been awarded litigation costs.

1. In 1974, the Department of Housing and Urban Development (HUD) acquired a three-story residential building in Chicago through a foreclosure action, pursuant to Section 204 of the Act, 12 U.S.C. 1710. The property subsequently fell into disrepair, and its value declined precipitously. In July 1976, HUD sold the building to the City of Chicago for $1. Pet. App. A3.

In April 1976, petitioners — individuals who live in the vicinity of the building and a neighborhood organization — brought this suit in the United States District Court for the Northern District of Illinois against several HUD officials and the broker hired by HUD to maintain the building (Pet. App. A2). Finding their cause of action in the Act, petitioners sought damages from the HUD officials in both their official and their individual capacities, asserting that the officials had violated the Act by allowing the property to become a hazard to public health (Pet. App. A2, A6).[1]

The district court granted summary judgment in favor of the HUD officials, holding that the Act provides no private cause of action (Pet. App. C1-C64). The court noted that the Act does not in terms create such a right (*id.* at C13); it declined to find a private cause of action implicit in the statute because petitioners "are not the sole or even primary beneficiaries of the [Act]" (*id.* at C32) and because creating a private damages remedy "would be at cross purposes with the fundamental objectives of the statute and other housing legislation" (*id.* at C38). But the court denied costs to the HUD officials, finding that the case presented novel questions and that petitioners were of "limited means" (*id.* at D1).

The court of appeals affirmed on the merits (Pet. App. A1-A35). The court found that petitioners failed to satisfy the standard for implying a private right of action that is set out in *Cort* v. *Ash*, 422 U.S. 66 (1975): they are not "*special* beneficiaries" of the Act (Pet. App. A10 (emphasis in original)); nothing in the Act's language or legislative history suggests that Congress wished to create such a right (*id.* at A11); and the creation of a damages remedy would injure the underlying legislative scheme by "mak[ing] HUD

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[1]Petitioners originally sought injunctive relief as well; that claim was abandoned when the building was sold in July 1976 (Pet. App. A2).

management reluctant to foreclose" (*id.* at A12). The court of appeals also held that the district court abused its discretion in denying the HUD officials costs (*id.* at A1-A2), although each of the judges expressed his reasoning on this point in a separate opinion (*id.* at A14-A15, A25-A29, A33-A34).

2. a. In considering petitioners' contention that a private right of action should be implied under the Act, the "focus must be on 'the intent of Congress.' " *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 377-378 (1982), quoting *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). That intent "may in turn be discerned by examining a number of factors, including the legislative history and purposes of the statute, the identity of the class for whose particular benefit the statute was passed, the existence of express statutory remedies adequate to serve the legislative purpose, and the traditional role of the states in affording the relief claimed." *Daily Income Fund, Inc.* v. *Fox*, No. 82-1200 (Jan. 18, 1984), slip op. 12. These criteria offer no support to petitioners.

As petitioners readily acknowledge (Pet. 16-17), there is absolutely nothing in the statutory language or legislative history suggesting that Congress intended to create a private right of action under the Act. It is equally plain that petitioners do not fall into a " 'class for whose *especial* benefit' " either the Act in general, or 12 U.S.C. 1710 in particular, was enacted. Cort, 422 U.S. at 78 (emphasis in original), quoting *Texas & P.R.R.* v. *Rigsby*, 241 U.S. 33, 39 (1916). While there is little doubt that the Act was in part designed to preserve existing neighborhoods and thus incidentally to benefit individuals in petitioners' circumstances (see 42 U.S.C. 1441a(b) and (c)), the district court correctly observed that "[t]here can be no questions, and [petitioners] do not dispute, that potential *inhabitants* of

federally-funded or supported housing are the primary beneficiaries of federal housing legislation" (Pet. App. C33 (emphasis added)). See 12 U.S.C. 1701t; 42 U.S.C. 1441. The mortgage provisions of the Act, meanwhile, were designed to benefit bankers, developers, and the United States itself. See *Shivers* v. *Landrieu*, 674 F.2d 906, 911 (D.C. Cir. 1981); *Falzarano* v. *United States*, 607 F.2d 506, 510 (1st Cir. 1979).[2] These considerations suffice to dispose of petitioners' claim that the Act creates a private right of action under the *Cort* v. *Ash* analysis[3] — and therefore necessarily dispose as well of petitioners' further, even more questionable, assertion that the Act affords them an action for damages against federal officers acting in their official capacities. See *United States* v. *King*, 395 U.S. 1, 4 (1969) (the federal government's "waiver [of sovereign immunity] cannot be implied but must be unequivocally expressed").

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[2]For these reasons, the courts of appeals have been unanimous in rejecting attempts even by the tenants or purchasers of federally-insured housing to assert a private right of action under the Act. *Shivers*, 674 F.2d at 911; *Falzarano*, 607 F.2d at 510; *Davis* v. *Romney*, 490 F.2d 1360, 1372 (3d Cir. 1974).

[3]The Court has indicated that, when the language and legislative history of a statute provide no indication that Congress intended to "create federal rights for the especial benefit of a class of persons," it is "unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of interest." *California* v. *Sierra Club*, 451 U.S. 287, 297-298 (1981). See *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-576 (1979). It is worth noting, however, that neither of these latter considerations aids petitioners. The creation of a damages remedy — particularly one that runs against HUD officials in their individual capacities — might well discourage officials from becoming involved at all in the construction or insurance of housing units. See *Shivers*, 674 F.2d at 912. And it is the state courts that traditionally have provided a forum for persons "harmed unreasonably by conditions on neighboring property" (Pet. App. A32 (Flaum, J., concurring)).

Despite petitioners' contention to the contrary, *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), is entirely consistent with this conclusion. In *Mitchell*, the Court addressed a complex set of statutes and regulations that "give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians" (slip op. 18) and that had been enacted against the background of "the undisputed existence of a general trust relationship between the United States and the Indian people" (*id.* at 19). In this extraordinary setting, the Court held that government mismanagement of timber resources on an Indian reservation could make the government "liable in damages [to the Indians] for the breach of its fiduciary duties" (*id.* at 20). In contrast, it is difficult to imagine how the provisions of the Act place HUD in a fiduciary relationship with individuals who live near federally-owned buildings.[4]

b. Petitioners' challenge to the court of appeals' costs decision is insubstantial. Petitioners do not deny that a presumption exists under Fed. R. Civ. P. 54(d) in favor of awarding litigation costs to the prevailing party (Pet.

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[4]Petitioners also are incorrect when they contend that congressional silence on the existence of a private right of action gives rise to a presumption in favor of *creating* such a right when the statute involved was enacted prior to this Court's decision in *Cort* (Pet. 21-22). The test enunciated in *Cort* and reiterated in cases such as *Daily Income Fund* is directed at ascertaining congressional intent; the Court accordingly applied the test in the *Cort* case itself to find no private right of action (see 422 U.S. at 77-85, interpreting 18 U.S.C. 610), and it repeatedly has done so since in finding that private rights were not created by statutes enacted prior to the *Cort* decision. See, *e.g.*, *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754 (1981) (interpreting Section 1 of the Davis-Bacon Act of 1931, 40 U.S.C. 276a); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979) (interpreting Section 17(a) of the Securities and Exchange Act of 1934, 15 U.S.C. 78q(a)); *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. 11 (1979) (interpreting Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*).

31-32). Here, the three opinions by the panel members offer a variety of considerations to support the conclusion that the district court erred in finding that presumption overcome: petitioners were not found to be indigent (Pet. App. A14, A34); the case was not of "landmark" importance (*id.* at A14) and in fact "border[ed] on the frivolous" (*id.* at A26); and the HUD officials did not "deserve to be penalized for their conduct in this litigation" (*id.* at A34). These factors justify the conclusion that there was no "element of injustice in a cost award" to the HUD officials. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 355 n.14 (1981). The court of appeals' fact-bound determination certainly does not warrant further consideration by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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